Supreme Court, U. S.
FILED
FEB 16 1979
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-739

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I

The government's brief in opposition ignores the central fact of this case: the grand jury proceeding was not delayed or interrupted by the certification and acceptance of the appeal under 28 U.S.C. § 1292(b). Not until a panel of the Sixth Circuit held that the proceeding was unlawful was the investigation interrupted, and that interruption was the result of the government's voluntary decision to suspend the grand jury, not the result of any motion or other action of General Motors Corporation.

The cases cited by the government for the proposition that grand jury orders are not appealable, and the dictum of the Sixth Circuit majority that "we do not believe that resolution of this issue at this time would 'materially advance the ultimate termination of the litigation'" (Pet. B-5), both rest upon the proposition that appeals should not be permitted to delay or obstruct a grand jury investigation. The proposition may have validity, but it has no applicability to this case.

The fact is that allowing § 1292(b) appeals from orders in grand jury proceedings, where the district court has certified that an immediate appeal would materially advance the litigation, is *less* likely to obstruct or delay the grand jury investigation than holding that such orders are not subject to § 1292(b) appeals.

This fact is illustrated by the government's own argument that an "adequate appellate remedy" exists in that GM can stand in contempt of court to get an appeal.

While an appeal under § 1292(b) does not delay the grand jury proceedings, standing in contempt completely halts the grand jury investigation while the contempt citation is litigated and appealed. If GM had stood in contempt on July 6, 1977 to protest the presence of an IRS employee in the grand jury room, the grand jury would have been suspended for months while the courts wrestled with the important legal issue involved here. Instead, GM complied with the subpoenas returnable on July 6 and took an appeal by obtaining a § 1292(b) certification from the district court. The grand jury conducted its investigation during the pendency of the appeal.

If the government were truly concerned about delay, it would have to concede that § 1292(b) is a far superior appellate remedy to standing in contempt.

Missing from the government's brief is any response to GM's citation of authority from other courts of appeals and from this Court supporting the proposition that this case is reviewable as a "civil action" under § 1292(b). Section 1292(b) provides a useful safety valve for review of difficult legal questions arising early in a lengthy grand jury proceeding. For the reasons stated by GM in its petition (pages 10-11) and recognized by the Courts of Appeals, of the First, Second and Third Circuits, this Court should resolve the essential conflict between the circuits by granting the petition for certiorari and should examine the important question whether a discretionary appeal under § 1292(b) is the most effective manner of resolving substantial questions in grand jury proceedings without interrupting the grand jury investigation.

II

The government's assertion that the decision below does not conflict with decisions in the First, Second and Third Circuits is simply not supported by the language of the decisions. The First Circuit said: "the Government could either have sought the cooperation of the district court in certifying this question under § 1292(b), or if it felt that circumstances warranted, go into contempt in order to obtain appellate review." *In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978). The Second Circuit said: "This is precisely the sort of case in which we would want the district court's judgment that there is a controlling question of law on which 'an immediate appeal . . . may materially advance the ultimate termination of the litigation.' 28 U.S.C. § 1292(b)." *In re Grand Jury Subpoena Served on John Doe*, 546 F.2d 498, 501-02 (2d Cir. 1976). The Third Circuit, as the government concedes in its brief, accepted the custodian's petition to appeal under § 1292(b) in *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 376 (3d Cir. 1976). Thus,

the present state of the law appears to be that § 1292(b) certifications will be available for the review of interlocutory matters of sufficient importance in grand jury proceedings in the First, Second, and Third Circuits, but not (unless the decision below is reviewed and reversed by this Court) in the Sixth Circuit.

III

The government argues that the district court's refusal to disqualify Mr. Piliaris from participating in the grand jury proceeding cannot be appealed under § 1291 because it can always be reviewed on appeal from some hypothetical later proceeding. This argument was also raised and emphatically rejected in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800, 805 (2d Cir. 1974) (en banc); see GM's petition at 14. In fact, the D.C. Circuit has suggested that an immediate appeal from an order denying disqualification is more appropriate in a grand jury setting than in a civil case; see GM's petition at 12, footnote 12.

The government asserts that it may take an appeal from an order denying disqualification of counsel in a grand jury proceeding, but a private party may not. This dual standard offends elementary principles of fairness. The right not to be subjected to any legal proceeding conducted by an attorney with a conflict of interest does not belong to the government alone. Such right is entirely independent of the ultimate outcome of the legal proceeding, and therefore cannot be vindicated on appellate review of a judgment. *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607 (8th Cir. 1977). The Sixth Circuit recently admitted that its present position denying immediate review under § 1291 of orders denying disqualification is the minority view and contrary to the holdings of seven other circuits. *Melamed v. ITT Continental Baking Co.*, 1979-1 Trade Cases (CCH) ¶ 62,433 (6th Cir. 1979), overruling prior decision reported at 534 F.2d 82 (6th Cir. 1976). The predominant view among the circuits is that the existence of a possible future avenue of appeal is an insufficient appellate remedy for an erroneous order refusing to disqualify an attorney who has a conflict of interest. The conflict presented by the decision below should be resolved by this Court.

IV

The government's final argument is that GM's substantive claim in the Sixth Circuit is without merit. Yet the district court certified the question as worthy of immediate review, a panel of the Sixth Circuit agreed in accepting the appeal, and another panel of the Sixth Circuit reversed the order of the district court on the merits. GM's position on the merits was vindicated until the subsequent decision of the Sixth Circuit that § 1292(b) could not be utilized in appealing orders related to grand jury proceedings.

In support of its position on the merits, the government misstates GM's position. It says (Brief in Opposition p. 16) that Petitioner contends "that the Attorney General has no power to appoint an attorney employed by the Internal Revenue Service to appear as an 'attorney for the government.'" In fact, GM's position as repeatedly stated in its petition is that a court should disqualify from participating in a grand jury investigation of a matter an IRS attorney "with substantial prior agency involvement" in such matter (Pet. 2).

The government does not respond to GM's showing that under the procedural rules of the IRS the extent of IRS participation in a grand jury investigation is determined by the requests of an "attorney for the government" (Pet. 19). The government does not deny that it is its position that the IRS attorney most responsible for an IRS

matter may become, and indeed in many cases should become, an "attorney for the government" in a grand jury investigation of the matter and, under IRS rules, make the requests which will allow an indefinite number of additional IRS personnel to participate in the grand jury investigation. The validity of these procedures, even absent the designation of an IRS attorney as an attorney for the government, has recently been placed before the Court in the petition for certiorari filed in *Fairchild Industries, Inc. v. Harvey*, No. 78-1055, filed December 29, 1978. The panel of the Sixth Circuit which first heard the matter was right in holding that the procedure used by the government in this case constitutes a "grand jury abuse" which this Court should correct.

For these reasons, and the reasons stated in GM's petition, this Court should issue a writ of certiorari in this case.

Respectfully submitted,

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